

The Keynote Address: Progressive Civil Liberties

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Thank you Professor Guinier. I've said this to Professor Guinier in private, but I'd like to say it in public before this audience. When she stood proud before the nation with all her dignity in the face of the vicious lies that were told about her, she stood for all women, for all women of color in particular, and she did us proud. Thank you very much.

I'd like to thank the organizers of this conference. I know that many of you worked long and hard to make this possible. I'd like to thank those of you in the audience who took the time to come in on a weeknight to think hard about issues of race, gender and politics. I think you're here because you all know that we have a lot of work to do. I have some concern that the talk that I've prepared is complex. It's not an easy version of First Amendment analysis, and there may be parts that are difficult to follow if you haven't been exposed to legal theory before. I'm asking you to stay with me because I'm trying to work these things through. This is the first time that I'm presenting this particular piece. I've been speaking for several years now on the issue of hate speech, but I'm trying tonight to answer a particular question that is raised by the call to this conference. That is, as progressive people, what do we make of the civil liberties tradition? How can we work with it to meet the needs of people we care about?

PROGRESSIVE CIVIL LIBERTIES

Somewhere tonight, in this city, a woman will pay with her body the price of patriarchy. With a fist to her face, with her sweat and terror, once again she will learn the lesson of her value in this world—as she did as a child, when she first asked the meaning of the word rape, as she turned that meaning over in her head, thinking, how can

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The following is an expanded version of the keynote address that Professor Matsuda delivered at the *Race, Gender & Free Speech* symposium held in Philadelphia on March 24 and 25, 1994. This piece is a written adaptation of the spoken word, not a formal law review article. The footnotes have been added.

this be? What world do I live in that this could happen to me because I am female? Rape, as we say theoretically, is constructed. It is not necessary. It is created by an idea we call patriarchy. It is created by an idea that combines sex and violence and domination. It is created by ideas expressed in pornography. Ideas, in the cosmology of traditional civil liberties, are sacred. The question I address tonight is this: What are progressive civil liberties? As women who care about women, as human beings who care about human beings, what do we need to keep in the civil liberties tradition, and what do we need to challenge?

When I open by reminding myself that women pay a real, concrete and bloody price for patriarchy, I mean that as a deliberate starting point for critiquing the civil liberties tradition. In that tradition, the price metaphor is central. We speak of "paying the price" for freedom. By starting with women, with all the women in this room and our knowledge that we are walking targets in a misogynist world, I want to call attention to an equally important price—the price of systems of oppression. As ethical human beings, we strive to end oppression. We strive to end the poverty that left homeless mothers with infants trudging through the melting snow in Washington, D.C., where I live, this past winter. We strive to end the quiet violence of racism, of homophobia, of sexism, of workplace exploitation that steals the joy of life from beautiful bodies.

We are warned as we seek to end these ills, of another price: the cost to civil liberties that may come with aggressive eradication of social ills. This warning is raised by both good faith and bad faith critics. In suggesting legal limits to assaultive speech—limits to hate propaganda that is directed against traditionally disempowered groups and which has the effect of excluding them from the workplace, from getting an education, from other opportunities and liberties—I have met and argued with many critics. There are good faith critics, like a feminist socialist I spoke with a few weeks ago, who said, "I've thought about what you're saying and I just can't agree with you because I don't trust the state and I don't want to give the state the power to censor. However harmful some speech may be to me, I fear the greater harm of state coercion."

I have also met bad faith critics. I have come to recognize these critics by their rage. However tentative and complex I try to make my arguments for limiting assaultive speech, I've come across the angry civil libertarian who acts as though I've stepped on his toes. This person yells. He uses language like "fascist," "thought police," "how dare you," "politically correct," "you people don't realize that you're the ones who need the First Amendment the most." Another favorite

retorical tool in this person's arsenal is the poor other guy over there, a professor at some school who is no longer teaching because he was taunted by students who called him racist; another professor whose reputation was ruined by charges of sexual harassment. At some point in the conversation, I realize that I am actually talking to the other guy: to someone enraged and confused by the changes taking place around him, angry at the invaders who challenge his speech with their own. This feels to him like the end of freedom.

At bottom, these critics, both the good and the bad faith, set up an inevitable coupling of aggressive eradication of oppression with a loss of civil liberties. If we have rules against assaultive speech, against pornography, against sexual harassment, we're on the road to a police state. If we promote new social conventions that stigmatize bigotry we introduce mind control. This coupling comes up in other areas troubling to feminists. If we restrict abortion clinic protest, do we endanger dissent? If we demand diligent prosecution of rape, do we inflate the power of a corrupt criminal justice system? It is not my intent to dismiss these concerns—they are real. I intend to ask what we, as feminists, as progressives, might make of the civil liberties tradition.

Traditional civil liberties feel traditionally male to me. The tradition is tough, smart and defiant. The state is the bad father—the tough guy—and the traditional civil libertarian is even tougher than the state. He is willing to feel the burn, to pay the price of freedom. There is an elitism here—this tradition is intentionally counterintuitive and not for the masses. The poor average chumps who can't take it or don't get it will never understand why the criminal must go free, why the swastika has to fly, why the child pornographer must keep his millions in order to maintain liberty for all.

When I swore allegiance to this tradition as a young person, I felt special because I got it. I could stand up and argue for the exclusionary rule while classmates and neighbors shouted outrage that a guilty person could go free. My hero was a mythical, leather-jacketed ACLU lawyer, on motorcycle, defending drug dealing, protest, and pornography; smashing the state wherever it dared to wrest power from the people. Later I learned—and mind you, this is a prototype, so don't think I'm talking about anybody you might know—that Mr. Leather Jacket was exploiting his secretary and his girlfriend, that the drug money supported right wing death squads, that the pornographer was filming rape and calling it free love. Just as there is no easy walk to freedom, there are no easy civil liberties.

The critical thinking that civil libertarians champion forces us to question the conventions of dominant civil libertarian thought. A key

device in this school of thought is the neutral, absolute rule. We don't ban speech regardless of whom it harms, because we are only safe with absolute rules that protect all speech. Discernment is impossible and dangerous. Absolutism protects us from the creeping tyranny that exceptions create. All speech must be free in order for the speech we value to remain free, thus the pornographer and the anti-war protestor, the clinic defender and those who would close down the clinic, are treated the same.

How does this traditional view meet the test of history? Not very well, I think. If we look at American history, we find that, first of all, absolute protection of speech has never been available to the citizens of this land. Every time—every single time—people have challenged existing power with any degree of success, they have been prosecuted, persecuted, sabotaged and silenced by the state. Protection of effective dissent is not a hallmark of our legal system. You can pick up any labor history text and know this. This history creates a longing for absolutism. If only we could forbid the state from ever touching our speech. Unfortunately, rules against speech codes could not have prevented what the police did to the Panthers. The absolutist view asks us to give up the ability to attack dangerous verbal assaults in exchange for something we could never have—at least not under present conditions: non-interference with progressive speech.

Another hallmark of the traditional civil liberties analysis is the public/private distinction. It is the state, the bad father, that the traditional civil libertarian fears. The threat to liberty comes from the state. Private systems of violence and oppression are not, therefore, a primary concern. Under present law, and according to most traditional civil libertarians, the state may not punish you for what you say, but a private employer may. This distinction hurts the cause of progressive speech. State and private suppression of liberty have always worked in tandem, such that a program of civil liberties that ignores private suppression of speech will never achieve its ends. Workers are silenced in the workplace because they need jobs. Women are silenced at home—by violence, by abuse, by incest, by the message that their ideas have little value and that if they speak, no one will listen. Citizens are silenced by a corporate communications monopoly that limits access to effective speech. All of these silencings are private. When the state acts to suppress speech, it often uses private actors as a cover. You may be familiar with the history of Klan and police cooperation in the post-Reconstruction south, with the many private employers who were induced by the F.B.I. to fire employees during the McCarthy period, with the mercenary Pinkertons who shot striking workers while the police conveniently looked the other way. I see the

neo-Nazis and cross burners of our day as direct inheritors of this tradition. Their goal is to harass, silence, threaten, and exclude. When the Aryan Nation thugs put your name on their computerized hit list after you write a letter to the editor supporting affirmative action, their intent is to end your speech. We get less speech, not more, when this kind of private silencing is seen as beyond the reach of the law.

In my view, progressive civil libertarians recognize private as well as public coercion as a threat to freedom. They operate not in terms of neutral absolute rules but in the context of the history and the culture that are ours. We are capable of discernment—of telling a cross burner from an anti-war protestor, a corporate monopolist from a striking worker.

Unlike current law, progressive civil liberties will see the elimination of systems of oppression as a primary goal, as a prerequisite to freedom. This kind of civil liberties will include, therefore, a range of economic rights in its platform. In addition, it will apply all rules with reference to how those rules effect immediate relations of domination and subordination. I do not claim credit for inventing this version of civil liberties. Within the civil liberties and civil rights communities, there have always been factions arguing for this expanded view. Within fine organizations like the ACLU, the debate continues over the role of substantive economic rights in the civil liberties cause.

What the traditional and the progressive views share is a respect for the individual, a tolerance of difference, a belief that democracy requires engaged critical inquiry. In the abstract these are important values. In the specific, we cannot avoid giving life to these values through a deep analysis of the world that we live in. Absolutism is not enough.

Let me try some examples. When a scared teenager trying to get an abortion must run a gauntlet of bloody photos, human tissue in jars, screams of "baby killer," absolutism is not enough. The simple civil liberties answer is that words, images, pickets, epithets, screams are speech; if it's speech, it's protected—the woman loses. Feminists insist that we add the social context—who has the power here? Certainly not this young woman who comes to the clinic out of desperation. We live in a world in which women are still struggling for control over their own bodies, for choice in their reproductive lives, for a share of political power. We live in a world in which the state has refused to offer women any assistance in the birthing and rearing of children—no paid maternity leave, no child care, not to mention, in many cases, no job, no housing. This is not an easy case. The man blocking the clinic entrance, screaming "baby killer" might look a lot like the man outside the factory entrance screaming "scab." If we

press the mute button and remove all identifying characteristics, we won't be able to tell them apart. But this is not how to make hard choices in a cruel world. We can't pretend not to know who is screaming what, to whom, in what context, with what result. Absolutist free speech analysis would give us an easy answer, a fast answer, but it would require that we ignore the reality facing women who are turned away from clinics. When feminists hold up coat hangers and say "never again," they are reminding us that women's bodies are on the line in this debate. Free speech neutrality must confront that coat hanger.

Here is another example. The Supreme Court has held that businesses have a privacy right, including the right to exclude safety inspectors who arrive unannounced at a job site to see whether safety regulations are being violated.¹ The Court held that inspectors have to obtain a warrant in advance.² The predictable result is that safety rules are often ignored until that rare event, the arrival of the inspector with warrant in hand. I have talked to workers who are told to put their safety shoes on only when the inspector is coming. There is good reason to promote rules against random searches and to require warrants. Some would argue that we have to follow this rule for factory owners as well as for homeowners and ordinary citizens in order to keep the arbitrariness of the state at bay. The progressive civil liberties I seek would again ask about history and social context—who needs privacy and why? Whose body is on the line in the factory search case? Who holds the power? Anyone who has ever worked for a living in factory or field or fancy law firm knows how hard it is to complain about work conditions when you need your job. The power here is in the hands of the employer, magnified tenfold by the ten people who are standing in line for any halfway decent job in our present economy. We pay for the failure to enforce job safety rules in human limbs, human lives. This, weighed against the privacy rights of fictitious legal entities, is real weight. There is more at stake, the traditionalists will argue. We must maintain the principle, the principle of privacy, the absolute purity of that principle. No warrantless searches. If they search the factory today, then they will search the women's bookstore tomorrow, and our bedrooms the day after. This is what I would like to ask the traditional civil libertarian: Is it inevitably impossible to draw a line, to consider the lives of working people, and to know that there is a difference between the factory and the bedroom?

1. *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

2. *Id.* at 324.

A similar argument is made against the regulation of pornography and assaultive speech. "Who will decide?" I am asked by hostile and friendly critics alike. Who will decide which speech is assaultive, which speech harms, excludes, degrades? My answers are several. I point out that the legal system is already deciding and has picked a long list of speech that is unprotected. False advertising, libel, slander, plagiarism, copyright infringement, fraud, price fixing conversations—I could go on and on. Present law restricts many kinds of speech—most often the kind of speech that interferes with business productivity, or which harms the reputations and livelihoods of powerful people. We have already given up the power to decide.

Defining assaultive speech is a serious challenge, but difficulty of definition is not, standing alone, a reason to avoid the work. There are many definitional problems in law: defining a conversation in restraint of trade, or identifying a text written with actual malice, for example, for purposes of defamation law. The fear of casting too wide a net in efforts to restrain harmful activity is a reason to maximize procedural and definitional safeguards. We do this all the time in law, in areas that present subtle and seemingly intractable definitional challenges. We do this because we believe in the rule of law, in the ability to come up with reasoned distinctions that will target harmful activity without unduly limiting freedom. This is what we do in our legal system, however imperfectly. If definition of harmful speech is impossible, we are doing the impossible as we define slander, fraud, and other forms of restricted speech. If definition is impossible, period, then we might as well throw out the whole legal system and go back to the state of nature.

Despite my distrust of the "we can't define it" argument, I am sympathetic with the goal of absolutist protection. I respect the purist argument, exemplified in the dissents of Justice Hugo Black, that we should never restrict speech, including libelous speech. His goal was to preserve the dissent that is the living center of democracy. Unfortunately, even if Justice Black's absolutism had held the day, this would not have preserved dissent. By dissent I mean the protest of the powerless that is aimed at changing existing conditions of domination. There are absolute rules against shooting unarmed students engaged in peaceful protests. There are absolute rules against murdering political activists in their sleep. This has not made us safe. It is too easy for the police to say, as they do every day in urban America, "I thought he was reaching for a gun."

What will make us safe, then? As people who care about promoting dissent, what do we need? We need to address the prerequisites of dissent. If we care about ending political repression, we have

to ask where repression comes from. This is where my work, I believe, intersects with Professor Guinier's. She is writing about a deep understanding of democracy; not a democracy made up of simple mathematical rules, like winner take all, but a democracy rich with democracy's full promise to include each and every citizen in the governing of their own lives. We need community control of police and prosecutors. We need widespread access to print and electronic media. We need literacy and a citizenry trained in critical thought. By critical thought, I do not mean, as is presently suggested, that we should have national standards that say if you know that three-fourths of the earth's surface is covered with water then you are a certified smart person. I mean we need to teach our children to ask questions, to seek answers with open and active minds. A populace capable of restraining abuse of state power is what will preserve liberty. An educated, economically empowered populace; one guaranteed not only the right of dissent, but the right of access to effective speech; a populace subsidized and encouraged to exercise all human rights—this is what will make speech free.

Here I want to address two particular problems that impede conversations like the one I am trying to start about the traditional notion of civil liberties. The first is confusion about what it means to think critically and with an open mind, and the second is the problem, for progressive people, of our relationship to the state.

As to the first, when I say that I value dissent, critical inquiry, and tolerance of diverse viewpoints, that's when the traditional civil libertarian will say, "Gotcha! Now you have to let the anti-Semites into the classroom, now you have to let the crosses burn, now you have to allow pornography in the workplace. You said you wanted tolerance, open-mindedness, welcoming all views."

This is a challenge I would like to address. How can I say I'm for critical thought when I'm also for restricting assaultive speech? Isn't all speech essential to critical inquiry? I think we have to be exactly that—critical. Letting a hundred voices speak at once is not necessarily the way to achieve critical thought. The goal of democratic free speech is to put conventional wisdom to the test. Putting conventional wisdom to the test requires rigor and sophistication. It requires discerning among genuine and spurious challenges. We do not have to include Holocaust deniers in our history curriculum because they are not about extending historical inquiry—they are about anti-Semitism. We do not have to let crosses burn, because they are not about debating race relations—they are about punishing, silencing, running families out of their homes.

I have seen too many students confused by the claim that unless we let hate-mongers into the room, critical inquiry will not take place. In fact, as a teacher, I have found that exactly the opposite is true. One of the hardest things to do in the classroom is to have honest, mutually critical discussions about racism, anti-Semitism, homophobia, and misogyny. We do not have enough of these discussions. We do not have models of how to have them, and a screaming match is the worst possible model. Hard and fast rules against name-calling, and requiring listening before attacking, are how I have managed to get these discussions started in my classroom. I have also had to ask more than one student to remain in the room when they've wanted to run out in tears. These are hard conversations, and pornography, anti-Semitic, racist and homophobic epithets do not further critical, probing dialogue.

It is the value of speech I hope to promote by suggesting that we may need to limit some speech. This is indeed a paradox—no easy walk to freedom, no easy civil liberties.

The second paradox is our relationship to the state. We know enough about dirty tricks, disinformation, police crimes, abuse of power, to make us believe that the state is a bad idea—period. My father, a World War II veteran and a lifelong progressive, tells me that smashing the state is an infantile fantasy—it is pre-fascist. The belief that government can do no good was the Reagan-Bush excuse for doing no good, even when we knew we could. In my view, President Clinton's New Democrats threaten to continue this tradition. There are problems the state can solve—easily. We are the richest country in the world, and we can provide decent housing, medical care, and education for all of our citizens. We can make sure that no child goes hungry. It is dangerous to believe, as many of my good-hearted, compassionate students believe, that these are intractable problems, that the government would just mess things up further if it ever tried to do anything. We have not tried, and we have de-funded the programs that we know work.

The citizenry needed to demand these things has been silenced, disinformed and excluded from power-sharing. As a progressive civil libertarian, my job is two-fold—to challenge abuses of state power, and to demand state intervention to equalize power. To dream of absolute restraints on the state—no searches, no speech codes, no fines for clinic protestors—before we have worked to equalize power will only mean that power stays as presently distributed. I do not mean to denigrate absolutism as an ideal, I mean only to challenge its simplistic, knee-jerk application.

It is a worthy ideal that we restrain the state. I am absolutist on certain things—torture, for one, killing, for another. I would support an absolute ban on the death penalty. It is a luxury—absolutism. The luxury of not asking to whom, to what end, in what historical context, with what present politics. It is so great to say, “I am against the death penalty, always, period, end of analysis. There is no case you could raise that would convince me to give the state the power to take the life of one of its citizens.”

Unfortunately, there are too few times when this kind of easy, absolutist response is something I can sleep with. We are too far away from a perfect world, from a state we can trust, from a state that will wither away because it is us. Until then, we need both to urge the state to use its power to just ends, and to act to restrain the state when its power endangers us.

Somewhere tonight, in this city, a woman will pay the price of patriarchy. There is nothing natural, necessary or inevitable about this. Freedom may cost, but the cost paid out in women’s bodies is one we pay too unevenly to call it liberty. Let women share power. Let workers govern the workplace. Then let us decide whose body fairly bears the wounds that liberty may demand. Until then, too often, conventional civil liberties can only mean business as usual. Until then, too often, the powerful will impoverish their own lives and the lives of others, calling it liberty when they grab for themselves all earthly gain, calling it freedom when they walk over other human beings. As a feminist, I demand more from the civil liberties tradition than this. I remember the legions of workers, of civil rights activists, of union organizers, of anti-war protestors, who have used the words “free speech” and “liberty” as words to an end, words with concrete promise, not neutral, detached abstractions that will protect us simply by their perfect purity, but words we give meaning to in our daily struggles for decent lives.